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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

THE UNITED STATES, PETITIONER

v.

COWDEN MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Claims (R. 12) is reported in 32 F. Supp. 141.

JURISDICTION

The judgment of the Court of Claims was entered on April 1, 1940. (R. 17.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Respondent contracted to sell to the United States a specified number of mechanic's suits at a stated price. The contract provided for the addition to the purchase price of any after-imposed federal taxes which might be "made applicable directly upon the * * * manufacture * * * of the supplies covered by this contract" and which "are paid by the contractor on the articles or supplies herein contracted for".

In purchasing cloth and thread to be used in manufacturing the suits, respondent was compelled to reimburse its vendors for processing taxes paid by them in producing these materials. Is respondent entitled to add such extra costs to the contract price in its sales of the suits to the United States?

STATUTE INVOLVED

The pertinent provisions of the Agricultural Adjustment Act, c. 25, 48 Stat. 31, are as follows:

PROCESSING TAX

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such com-

modity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b) * * *

(d) As used in part 2 of this title—

(2) In case of cotton, the term "processing" means the spinning, manufacturing, or other processing (except ginning) of cotton; * * *

STATEMENT

The special findings of fact of the Court of Claims may be summarized as follows:

Respondent, a Missouri corporation, entered into a contract with the United States through the proper purchasing officer of the Quartermaster Corps at Philadelphia, Pennsylvania, on June 24, 1933, under the amended terms of which respondent agreed to sell to the United States 35,220 suits, mechanics type B-1, at \$1.90 each, or a total of \$66,918. The suits were delivered to and accepted by the petitioner and the sum of \$66,918 was paid to the respondent. (R. 9, 10.)

The contract in question was made pursuant to a bid submitted to the War Department by the

respondent on June 6, 1933. Both the bid and the contract contained the following provision (R. 10):

Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the government and entered on vouchers (or invoices) as separate items.

Respondent purchased the cotton cloth from which it manufactured the suits in question from McCampbell and Company, 320 Broadway, New York, selling agent for Graniteville Manufacturing Company of South Carolina, under a contract providing for increasing the price of the cotton by the amount of any federal taxes imposed after the contract date and before delivery of the cloth. Pursuant to this provision McCampbell and Company billed respondent as a separate item on the invoices for the cloth in question in the amount of \$4,425.54, covering processing taxes paid by the first proces-

sor of the cloth to the Collector of Internal Revenue. (R. 10, 11.)

In the manufacture of the suits respondent also used a substantial quantity of cotton thread purchased from American Thread Company under a contract containing a provision similar to that heretofore referred to, as a result of which respondent paid to American Thread Company \$44.44, covering processing taxes paid by that company to the Collector of Internal Revenue on the thread in question. (R. 11.)

Respondent filed a claim against the United States with the War Department for the amount of \$4,469.98, being the aggregate processing tax applicable to the cotton cloth and thread used in the manufacture of the suits. The claim was referred to the Comptroller General of the United States and was rejected by him on August 11, 1936. (R. 11-12.)

On December 1, 1938, this suit was filed in the Court of Claims, which rendered an opinion in favor of the respondent and entered judgment in the amount of \$4,469.98. (R. 1, 9, 17.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that respondent is entitled to reimbursement under the terms of the contract for taxes ultimately borne by it but paid by the first processors of the materials used by respondent in the manufacture of the supplies covered by the contract.

2. In failing and refusing to hold that the taxes were not "made applicable directly upon the production, manufacture or sale of the supplies" covered by the contract and were not "paid by the contractor on the articles or supplies" contracted for.

3. In holding that the taxes involved were "imposed or changed by the Congress after the date set for the opening of the bid".

4. In failing to enter judgment for the United States and dismiss the petition.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts in principle with *United States v. Glenn L. Martin Co.*, 308 U. S. 62, and presents a question of general importance. That case involved the application of a substantially identical contractual provision to taxes imposed by the Social Security Act. This Court stressed the fact that the taxes must be "on" the articles sold to the United States. (P. 65.) Here, the articles sold to the United States were articles of clothing, and the taxes in question were imposed, not upon the manufacture of those articles, but upon the prior manufacture of the cloth and thread. Indeed, the instant case is an even stronger one for the Government than the *Glenn L. Martin Co.* case, for the taxes there were imposed in connection with the manufacture of the very products that were sold to the United States.

The conflict with the *Glenn L. Martin Co.* case is emphasised by the further requirement in the contract that the taxes must be "paid by the contractor on the articles or supplies herein contracted for". (R. 10.) Plainly, respondent did not become a taxpayer merely by reimbursing its vendors for processing taxes which they had paid. *Oswald Jaeger Baking Co. v. Commissioner*, 108 F. (2d) 375 (C. C. A. 7th), certiorari denied, April 1, 1940, No. 771, 1939 Term. The only reasonable interpretation of this language is that the contractor seeking reimbursement must have been the taxpayer and that the tax must have been paid on the finished product sold to the Government. The practical difficulties of tracing taxes imposed at some anterior stage upon the processing of the raw materials employed in producing the finished product preclude the contrary view.¹

¹ The opinion of the Court of Claims did not consider in detail the issue upon the basis of which we are asking for certiorari. It discussed only whether the taxes in question were "imposed or changed by the Congress after the date set for the opening of the bid" within the meaning of the contract in the light of the fact that the Agricultural Adjustment Act was enacted *before* that date. The Government had contended that the mere fact that the imposition of the taxes was delayed until after the proclamation of the Secretary of Agriculture which occurred after the critical date did not convert them into taxes "imposed * * * by the Congress" after that date.

The question that we raise here was fully briefed and argued, but it was summarily disposed of by the Court of Claims by reference to its earlier decisions in *Batavia Mills, Inc. v. United States*, 85 C. Cls. 447, and *Telescope Folding*